Supreme Court, U.S.
FILED

No. 01 752 AUG 17 2001

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In The

Supreme Court of the United States

RANDLE CURTIS DANIELS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. WHETHER *"CONSTRUCTIVE AMENDMENT* [ ] *OF A FEDERAL INDICTMENT* [IS] *ERROR PER SE* [WHICH] *MUST BE CORRECTED ON APPEAL, EVEN WHEN NOT PRESERVED BY OBJECTION"*?

II. WHETHER CONSTRUCTIVE AMENDMENT OF A FEDERAL INDICTMENT IS A *"SPECIAL CATEGORY"* OF PLAIN ERROR THAT MAY BE CORRECTED, PURSUANT TO RULE 52(b), *"REGARDLESS OF* [THE ERROR'S] *EFFECT ON THE OUTCOME"* OF THE TRIAL?

III. WHETHER ERROR THAT PERMITS CONVICTION UPON A CHARGE NOT MADE BY THE GRAND JURY INDICTMENT *"AFFECTS THE FAIRNESS, INTEGRITY, OR PUBLIC REPUTATION OF JUDICIAL PROCEEDINGS"*?

IV. WHETHER, THE COURT OF APPEALS APPLIED AN INAPPROPRIATE HARMLESS ERROR STANDARD WHEN IT REFUSED TO CORRECT CONSTRUCTIVE AMENDMENT OF THE INDICTMENT BECAUSE *"IT IS EQUALLY POSSIBLE THAT THE JURY . . . PROPERLY CONVICTED* [THE DEFENDANT] *FOR THE INDICTED ACT OF WITHDRAWING ILLICIT FUNDS"* INSTEAD OF *"FOR THE UNINDICTED ACT OF DEPOSITING ILLICIT FUNDS"*?

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OPINION BELOW

The opinion of the Court of Appeals for the Tenth Circuit is reported at *United States v. Daniels*, 252 F.3d 411 (5th Cir. 2001), and the original opinion is reproduced in the appendix attached hereto.

JURISDICTION

The judgment to be reviewed was entered on May 21, 2001. Appendix pp. 1-7. Appellant's Petition for Rehearing and Suggestion for Rehearing En Banc were denied on July 6, 2001. Appendix p. 8-9.

Jurisdiction is conferred on this court by 28 U.S.C. § 1254(1) and Rules 10(a) and (c), Supreme Court Rules.

CONSTITUTIONAL PROVISION INVOLVED

Fifth Amendment to the United States Constitution:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment or indictment of a Grand Jury."

STATEMENT OF THE CASE

The basis for federal jurisdiction in the district court[1] was 18 U.S.C. § 3231.

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[1] The Northern District of Texas, Fort Worth Division, Honorable Terry Means.

Procedural History

On February 10, 1999, the Grand Jury returned a two count indictment. Count One charged Petitioner with bank theft, 18 U.S.C. § 2113(b) and Count Two charged Petitioner with violation of 18 U.S.C. § 1957[2] (engaging in monetary transactions in property derived from specified unlawful activity). On February 4, 2000, the jury convicted Petitioner under both counts of the indictment.

Petitioner's sentence was determined on the basis of his conviction in Count Two, pursuant to USSG § 3D1.3(b), because the applicable guideline USSG § 2S1.2 *"produces the highest offense level"*, level 17. The sentence was enhanced by a two level increase for obstruction of justice, USSG § 3C1.1, which resulted in a *"total offense level: 19"*.[3] The guideline applicable to Count One (Theft of $29,800), USSG § 2B1.1(b)(1)(H) produces offense level 11. A two level increase for obstruction would result in a total offense level of 13. A level 19 Criminal History Category I determination results in a sentencing range of 30 to 37 months, while level 13 results in a sentencing range of 12 to 18 months. On June 20, 2000, Petitioner was sentenced to 30 months confinement.

Petitioner filed Notice of Appeal on June 23, 2000.

On May 21, 2001, Circuit Judges Reynaldo G. Garza, Higginbotham, and Smith affirmed the trial court's conviction. Judge Higginbotham wrote the Panel decision

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[2] Set out verbatim, Appendix pp. 10-11.

[3] Presentence Report, p. 11, "Offense Level Computation", Appendix pp. 12-13.

and Petitioner's Motion for Rehearing En Banc was denied on July 6, 2001.

Statement of Facts

The Indictment:

Count Two of the indictment specifically charged Petitioner with engaging in a particular *"monetary transaction . . . that is . . . Daniels*[4] caused the withdrawal in the amount of $29,500.00 from the account of Marsha Veach . . . at Bank One" in violation of 18 U.S.C. §§ 1957 and 2. Appendix pp. 14, 15.

The Evidence:

Marsha Veach testified that on December 6, 1995, she wrote a $29,500.00 check on her Bank One account, payable to a Texas Commerce account belonging to Petitioner. Ms. Veach first claimed that the *"withdrawal was at Mr. Daniels' request."* During cross-examination, however, Veach admitted that it was actually her idea to withdraw the money from her account and put it into Petitioner's account. Appendix p. 16.

The government made no attempt to rehabilitate Veach, or explain away her testimony that it was her idea, not Petitioner's, to withdraw the funds from her Bank One account.

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[4] Petitioner

The Jury Instructions:

The jury instructions did not require a finding that *"Daniels caused the withdrawal* [of funds] *from the account of Marsha Veach at Bank One,"* as charged in the indictment. The jury instructions, instead, authorized conviction if the jury found that Petitioner had caused any *"monetary transaction"* as broadly defined by § 1957(f)(1): *"the deposit, withdrawal, transfer, or exchange . . . of funds or a monetary instrument by, through or to a financial institution. . . . "* Appendix, pp. 17-22.

The Jury Arguments:

Defense counsel's jury argument focused on Veach's admission that it was her idea to withdraw the funds from her account at Bank One, and contended that Petitioner therefore should be acquitted of the offense charged in Count Two. Appendix p. 23.

The prosecutor countered by arguing that Daniels should nevertheless be convicted because he had caused another monetary transaction, the deposit of funds into Veach's savings account at Omni American Federal Credit Union. Appendix p. 24.

The Court of Appeals' Decision:

The Court of Appeals *"assum*[ed] *without deciding"* that the indictment had been constructively amended, that this was error, that *"the error was plain"* and that *"the plain error affected the substantial rights of the defendant."* *Daniels*, 252 F.3d at 414. The Court, however, refused to correct *"any error"*. The Court explained that *"causing the*

deposit could have properly been charged in the indictment"; the unindicted act of *"causing the deposit"* and the *"withdrawal"* charged in the indictment were *"closely linked"*; *"evidence of the deposit* [was] *relevant"*; there was *"no evidence of bad faith on the part of the prosecutor"*; and while *"*[t]*he jury may have . . . convicted Daniels for the unindicted act of depositing illicit funds . . . it is equally possible that the jury . . . properly convicted Daniels for the indicted act of withdrawing illicit funds." Id.*

REASONS FOR GRANTING CERTIORARI

1. THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW IN A WAY THAT CONFLICTS WITH *STIRONE V. UNITED STATES*, 361 U.S. 212 (1960), A RELEVANT SUPREME COURT DECISION.

Petitioner concedes that *"causing the deposit could have properly been charged in the indictment"*; the unindicted act of *"causing the deposit"* and the *"withdrawal"* charged in the indictment were *"closely linked"*; *"evidence of the deposit* [was] *relevant"*; and that there was *"no . . . bad faith on the part of the prosecutor"*, as stated by the Court of Appeals.[5] Petitioner also concedes that it may be *"equally possible"* that the jury actually convicted him for withdrawing illicit funds from the Bank One account as alleged in the indictment, instead of for the unindicted act of depositing funds in the OmniAmerican account.

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[5] *Daniels*, 252 F3d at 414.

Petitioner nevertheless contends that the Court of Appeals decided the case in a way that conflicts with *Stirone v. United States*, 361 U.S. 212, 80 S.Ct. 270 (1960).

Paraphrasing *Stirone*, *"The indictment here cannot fairly be read as charging* [that Petitioner caused the deposit of funds into Marsha Veach's savings account at Omni-American]. *The Grand Jury which found the indictment was satisfied to charge that* [Petitioner caused the withdrawal of funds from Veach's account at Bank One] *and it cannot be said with certainty that with a new basis for conviction added* [Petitioner] *was convicted solely on the charge made in the indictment the Grand Jury returned." Stirone*, 361 U.S. at 217, 80 S.Ct. at 273.[6] *"Although the trial court did not permit a formal amendment of the indictment, the effect of what it did was the same. And the addition charging* [that Petitioner deposited funds] *here is neither trivial, useless, nor innocuous." Id.*

"[The] *variation between pleading and proof . . . destroyed . . . the defendant's substantial right to be tried only on charges presented in an indictment returned by a grand jury." Stirone*, 361 U.S. at 217, 80 S.Ct. at 273. *"The right to have the grand jury make its own judgment is a substantial right which cannot be taken away with or without court amendment." Id.* at 218-19, 80 S.Ct. at 274. *"Deprivation of such a basic right is far too serious to be treated as nothing more than a variance and then dismissed as harmless error." Id.* at 217, 80 S.Ct. 273.

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[6] The Court's decision found that it was *"equally possible"* that Petitioner was convicted for the *"unindicted act of depositing illicit funds"*, instead of *"properly convict*[ing] *Daniels for the indicted act of withdrawing illicit funds." Daniels*, 252 F.3d at 414.

2. THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT HAS ENTERED A DECISION IN CONFLICT WITH A DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

Direct Conflict:

The Fifth Circuit's decision, herein, *United States v. Daniels*, 252 F.3d 411 (5th Cir. 2001), is in direct conflict with *United States v. Floresca*, 38 F.3d 706 (4th Cir. 1994), an en banc decision of the United States Court of Appeals for the Fourth Circuit.

In our case, the Fifth Circuit explained:

> *"It is now clear that this circuit applies plain error review to forfeited constructive amendment arguments. Although United States v. Mize*, 756 F.2d 353, 355-57 (5th Cir. 1985), *held that constructive amendment required automatic reversal, later cases in this circuit have clarified the interaction between the automatic reversal rule and plain error review. In United States v. Reyes*, 102 F.3d 1361, 1364-66 (5th Cir. 1996), *we held that under United States v. Olano*, 507 U.S. 725 (1993), *we have discretion to correct a constructive amendment if the defendant failed to object at trial. Further, in United States v. Fletcher*, 121 F.3d 187, 192-93 (5th Cir. 1997), *we expressly recognized the tension between plain error review and the 'automatic reversal' rule of Mize, and reconciled it favor of plain error review, following the Supreme Court's guidance in Olano."*

Daniels, 252 F.3d at 413, n. 8.

In *Fletcher*, the Fifth Circuit had expressly refused to follow *Floresca*,[7] because the *Fletcher* panel was *"bound by . . . a prior panel decision of the Fifth Circuit."* *Fletcher*, 121 F.3d at 192, n. 4 (citing *Reyes*, 102 F.3d at 1364-66).

The Ninth Circuit has also recognized the conflict:

> *"Since Olano the Fourth Circuit has held that regardless of whether a defendant objects, Stirone* demands reversal when a constructive amendment has occurred," while on the other hand, "[t]*he Fifth Circuit* [holds] *that it has discretion under Olano to decide whether or not to correct a constructive amendment error."*

United States v. Shipsey, 190 F.3d 1081, 1087 (9th Cir. 1999), citing *Floresca*, 38 F.3d at 713 and *Reyes*, 102 F.3d at 1365.[8]

The Fourth Circuit:

In *Floresca*, the Fourth Circuit held:

> *"[U]nder Stirone, constructive amendments of a federal indictment are error* ***per se****, and, under Olano, must be corrected on appeal even when not preserved by objection."*

Floresca, 38 F.3d at 714.

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[7] A Fourth Circuit decision.

[8] The Ninth Circuit still remains neutral: *"As we did in Shipsey, we find it unnecessary . . . to consider whether a constructive amendment always requires reversal, even under plain error review, because we conclude that the defendants were prejudiced by the constructive amendment."*

United States v. Dipentino, 242 F.3d 1090, 1095 (9th Cir. 2001).

The *Floresca* court explained:

> *"Though Olano obviously stands for the rule that a defendant must ordinarily demonstrate that he has been prejudiced by the error in order to prevail, it is equally evident that the Olano court contemplated that there would be exceptions to that rule. There may be a special category of forfeited errors that can be corrected* ***regardless*** *of their effect on the outcome."*

Id. at 712 (citing *Olano*, 113 S.Ct. at 1778) (emphasis supplied).

The Fourth Circuit then held:

> *"Thus, while interpreting Stirone to mean what it says – that an inquiry into prejudice is not appropriate where a constructive amendment has occurred – is entirely consistent with Olano, interpreting Olano to require a showing of prejudice in* ***every*** *case essentially overrules Stirone. The Supreme Court has not overruled Stirone and we may not."*

Id. (emphasis supplied).

The *Floresca* court, *"d*[id] *not hesitate to say that convicting a defendant of an unindicted crime affects the fairness, integrity, and public reputation of federal judicial proceedings in a manner most serious." Floresca*, 38 F.3d at 713. *"Our founding fathers realized that the grand jury is vital in preventing prosecutions grounded solely in spite, revenge, or difference in political philosophy. We believe that the wisdom of the Framers in this regard has stood the test of time." Id.*

The Fifth Circuit:

In our case,[9] *Stirone*, is not even mentioned. The previous Fifth Circuit cases, *Reyes* and *Fletcher*, do not address *Stirone*'s holding that harmless error review is not appropriate. These cases instead simply hold that, under *Olano*, the Court of Appeals has *"authority to order correction,* [of plain error] *but is not required to do so." Reyes*, 102 F.3d at 1365.

3. THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW IN A WAY THAT CONFLICTS WITH *STROMBERG V. CALIFORNIA*, 283 U.S. 359 (1931), A RELEVANT SUPREME COURT DECISION.

The Court of Appeals refused to correct the error because:

> *"The jury may have credited* [a government witness'] *testimony and convicted Daniels for the unindicted act of depositing illicit funds; but it is equally possible that the jury disbelieved her testimony and properly convicted Daniels for the indicted act of withdrawing illicit funds. . . .* [T]*his claimed constructive amendment did not render the proceedings fundamentally unfair."*

Daniels, 252 F.3d at 414.

"[W]*hen a case is submitted to the jury on alternative theories,* [however], *the unconstitutionality of any of the theories requires that the conviction be set aside." Boyde v.*

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[9] *United States v. Daniels*, 252 F.3d 411 (5th Cir. 2001).

California, 494 U.S. 370, 379-80, 110 S.Ct. 1190, 1197 (1990). In such cases, "[a]*lthough it is possible that the guilty verdict may have had a proper basis, 'it is equally likely that the verdict rested on an unconstitutional ground' and* [the Supreme Court has] *declined to choose between two such likely possibilities." Id.* citing *Stromberg v. California*, 283 U.S. 359, 51 S.Ct. 532 (1931); *Leary v. United States*, 395 U.S. 6, 31-32, 89 S.Ct. 1532, 1545-46 (1969) and *Bachellar v. Maryland*, 397 U.S. 564, 571, 90 S.Ct. 1312, 1316 (1970). The Ninth Circuit recently applied this rule in *Murtishaw v. Woodford*, 2001 WL 709185, at p. 34 (9th Cir. 2001).

"[A] *court cannot permit a defendant to be tried on charges that are not made in the indictment against him." Stirone*, 361 U.S. 212 at 217, 80 S.Ct. at 273. *"Few constitutional principles are more firmly established than a defendant's right to be heard on the specific charges of which he is accused." Dunn v. United States*, 442 U.S. 100, 106, 99 S.Ct. 2190, 2194 (1979).

"The prosecution bears the burden of proving all elements of the offense charged . . . and must persuade the factfinder 'beyond a reasonable doubt' of the facts necessary to establish each of these elements." Sullivan v. Louisiana, 508 U.S. 275, 277-78, 113 S.Ct. 2078, 2080 (1993). The jury in our case, however, was not required to find that Petitioner caused the withdrawal of funds from Bank One as charged in the indictment. The Court's charge authorized conviction even if the jury doubted that Petitioner caused the withdrawal, but instead were convinced that he had caused a deposit in a different account at a different bank on a different occasion. *"Harmless-error review looks . . . to the basis on which 'the jury* ***actually rested*** *its verdict'. . . . The inquiry . . . is not whether in a trial that occurred without the*

error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in **this** *trial was surely unattributable to the error." Id.* 508 U.S. at 279, 113 S.Ct. at 2081-82 (emphasis supplied).

4. THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THE UNITED STATES SUPREME COURT.

The Standard for Harmless Error Review:

The Court of Appeals did not expressly hold that Petitioner had the burden of proving, by a preponderance of the evidence, that he had been convicted for an act not charged by the grand jury indictment, but that is the practical effect of its decision.

The prosecution ordinarily has the burden of proving that federal constitutional error is harmless beyond a reasonable doubt. *Chapman v. California,* 386 U.S. 18, 24, 87 S.Ct. 824, 828 (1967). Even under the *"less strict" Brecht v. Abrahamson*[10] standard, *"a habeas court . . . in grave doubt as to the harmlessness of an error that affects substantial rights . . . should grant relief." O'Neal v. McAninch,* 513 U.S. 432, 445, 115 S.Ct. 992, 999 (1995). A habeas court has a *"grave doubt"* when *"in the judge's mind, the matter is so evenly balanced that he feels himself in virtual equipoise as to the harmlessness of the error." Id.* 513 U.S. at 435, 115 S.Ct. at 994. In our case, the Court of Appeals concluded that it

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[10] 507 U.S. 619, 627, 113 S.Ct. 1710, 1716 (1993).

was *"equally possible"* that the jury convicted Petitioner for the unindicted act of depositing illicit funds. *Daniels*, 252 F.3d at 414. But, the Court nevertheless concluded: *"this claimed constructive amendment did not render the proceedings fundamentally unfair." Id.*

Rule 52(b) imposes a burden on the defendant to establish that his *"substantial rights"* were affected by forfeited error. The Supreme Court has held, "[i]*t is the defendant rather than the government who bears the burden of persuasion with respect to prejudice." Olano*, 507 U.S. at 734, 113 S.Ct. at 1778. In *Olano*, however, the court held: *"We need not decide whether the phrase 'affecting substantial rights' is always synonymous with 'prejudicial.' " Id.* 507 U.S. at 735, 113 S.Ct. at 1778.

Olano holds that "[t]*he Court of Appeals should correct a plain forfeited error affecting substantial rights if the error 'seriously affects the fairness, integrity or public reputation of judicial proceedings.' " Id.* at 507 U.S. 736, 113 S.Ct. at 1779.

In *Johnson v. United States*, 520 U.S. 461, 469, 470, 117 S.Ct. 1544, 1549 (1997), the court subsequently held that an erroneous jury instruction which omitted *"materiality,"* an essential element of the offense did not *"seriously affect the fairness, integrity or public reputation of judicial proceedings"*, because *"the evidence supporting materiality was 'overwhelming' "*, and *"essentially uncontroverted." Id.* The standard for determining this issue, however, remains unclear. *Johnson* relied on *"overwhelming"* and *"uncontroverted"* evidence. In our case, however, the Court of Appeals, while acknowledging that Petitioner may actually have been convicted *"for* [an] *unindicted act"* refused to correct the error, because the court believed that it was

"equally possible" that Petitioner had been properly convicted. *Daniels*, 252 F.3d at 414.

The Court of Appeals' decision, herein, effectively imposes an impossible burden on Petitioner, proof by a preponderance of the evidence that the jury actually convicted him of the unindicted conduct.

CONCLUSION

For the foregoing reasons, Petitioner, Randle Curtis Daniels, respectfully requests that this Court grant his Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit, and reverse his conviction.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 00-10672

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

RANDLE CURTIS DANIELS,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Texas

(Filed May 21, 2001)

Before REYNALDO G. GARZA, HIGGINBOTHAM, and SMITH, Circuit Judges. HIGGINBOTHAM, Circuit Judge:

Randle Daniels appeals his conviction for bank theft and money laundering. Daniels's main argument is that he believed in good faith that he was entitled to the money he took from Colonial Savings Bank; that as a matter of law he lacked the required *mens rea*. We disagree, and affirm.

I.

Colonial Savings held the mortgage on Daniels's home. A hail storm damaged its roof. His insurance company sent him a check for $46,000 to cover the cost of repairs.

Aware of the mortgage, the insurance company made the check payable to Randle Daniels and Colonial Savings jointly. Daniels took the check to Colonial Savings and asked them to endorse it to him. The bank refused, preferring to hold the money in a trust account, disbursing it as actual repairs were made. Daniels and the bank resolved their differences, agreeing that the bank would pay Daniels $16,000 immediately, and place the remaining $30,000 into a trust account, to be disbursed as Daniels presented receipts for repairs.

While the $16,000 check was being prepared, Daniels stole a blank, signed bank check from the desk of a bank employee. He made that check out for $29,800, and directed his girlfriend, Marsha Veach, to deposit it in her account. She did so and later wrote him a check for $29,500.

The check was traced to Daniels, and he was charged with bank theft and money laundering. His defense at trial was that a bank representative gave him the blank check. A jury convicted him of both charges and he now appeals.

II.

Daniels argues that, as a matter of law, he lacked specific intent to steal as required by 18 U.S.C. § 2113. Since Daniels believed the proceeds from the insurance check to be his, his argument goes, he cannot have had the required *scienter*.

The relevant portion of section 2113 provides that a defendant who "takes and carries away, with intent to

steal, or purloin, any property or money or any other thing of value exceeding $1,000 belonging to, or in the care, custody, control, management, or possession of any bank" shall be punished.[1] In *Carter v. United States*,[2] albeit in dictum, the Supreme Court stated that 18 U.S.C. § 2113 (b) required a specific intent to steal or purloin because without such an intent requirement, the "statute would run the risk of punishing seemingly innocent conduct in the case of a defendant who peaceably takes money believing it to be his."[3]

Daniels's argument is essentially an insufficiency of the evidence contention. As such, it is unpersuasive. A rational jury could have concluded that Daniels did not believe he was entitled to take the money. The check was payable to both Daniels and Colonial Savings. With Daniels's debt to Colonial Savings secured by his home, Daniels had to be aware of the bank's interest in the insurance proceeds. At least a rational juror could have so found. Daniels acknowledged as much in his agreement with the bank. His awareness of the bank's interest and his intent unlawfully defeat it is further evidenced by his covert conduct – waiting until the bank representative had left his presence before taking the bank check from a desk drawer.

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[1] 18 U.S.C. § 2113(b) (West 2000).

[2] 530 U.S. 255 (2000).

[3] *Id.* at 269.

III.

Daniels contends that the jury charge on money laundering constructively amended the indictment. The indictment charged Daniels with causing the withdrawal of $29,500 from Veach's bank account. The trial judge instructed the jury that it must find that Daniels "knowingly engaged or attempted to engage in a monetary transaction in criminally derived property that is of value greater than $10,000." At trial, there was evidence that Daniels ordered both the deposit of the check and also the withdrawal of the money. Veach initially testified as a government witness that Daniels directed her to make the deposit and withdrawal. On cross examination, she stated that it was her idea to make the withdrawal. The argument is that the jury instruction permitted the jury to convict Daniels for causing the *deposit* of the illicit funds under an indictment charging only their *withdrawal*.

A criminal defendant has a Fifth Amendment right to be "tried only on charges presented in grand jury indictments,"[4] and therefore only the grand jury may amend an indictment once it has been issued.[5] A jury charge constructively amends an indictment, in violation of the Fifth Amendment, if it permits the jury "to convict the defendant upon a factual basis that effectively modifies an essential element of the crime charged."[6] That is, constructive amendment occurs if the jury is permitted to

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[4] *United States v. Chandler*, 858 F.2d 254, 256 (5th Cir. 1988).

[5] *See id.*

[6] *Id.* at 257.

convict on "an alternative basis permitted by the statute but not charged in the indictments."[7]

Daniels did not object at trial to the jury instructions. We therefore review only for plain error.[8] A jury charge is plain error if: (1) it was erroneous; (2) the error was plain, and (3) the plain error affected the substantial rights of the defendant.[9] If those conditions are met, we have discretion to correct the error; discretion we will exercise if the error "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings."[10]

Assuming without deciding that the first three requirements are met, in this case we decline to exercise our discretion to correct any error. The unindicted act of causing the deposit of illicit funds could have properly

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[7] *United States v. Robles-Vertiz*, 155 F.3d 725, 728 (5th Cir. 1998).

[8] *See* Fed. R. Crim. P. 52(b). It is now clear that this circuit applies plain error review to forfeited constructive amendment arguments. Although *United States v. Mize*, 756 F.2d 353, 355-57 (5th Cir. 1985), held that constructive amendment required automatic reversal, later cases in this circuit have clarified the interaction between the automatic reversal rule and plain error review. In *United States v. Reyes*, 102 F.3d 1361, 1364-66 (5th Cir. 1996), we held that under *United States v. Olano*, 507 U.S. 725 (1993), we have discretion to correct a constructive amendment if the defendant failed to object at trial. Further, in *United States v. Fletcher*, 121 F.3d 187, 192-93 (5th Cir. 1997), we expressly recognized the tension between plain error review and the "automatic reversal" rule of *Mize*, and reconciled it in favor of plain error review, following the Supreme Court's guidance in *Olano*.

[9] *See Olano*, 507 U.S. at 731-34; *Fletcher*, 121 F.3d at 192.

[10] *See Olano*, 507 U.S. at 736; *Fletcher*, 121 F.3d at 192.

been charged in the indictment and is prohibited by statute.[11] The two acts – deposit and withdrawal – are so closely linked here that we are convinced that the "fairness, integrity or public reputation of judicial proceedings" is not implicated. There is no evidence of bad faith on the part of the prosecutor. It was obvious that evidence of the deposit and other transactions would be relevant to prove that Daniels controlled the funds and to impeach any testimony that the withdrawal was Veach's own idea. The jury may have credited her testimony and convicted Daniels for the unindicted act of depositing illicit funds; but it is equally possible that the jury disbelieved her testimony and properly convicted Daniels for the indicted act of withdrawing illicit funds. After all, under Daniels's claim of entitlement, a withdrawal at his direction would have been inevitable – unless he intended to make the funds a gift to Veach. This claimed constructive amendment did not render the proceedings fundamentally unfair.

IV.

The remainder of Daniels's arguments are equally meritless. Daniels argues that the evidence was insufficient to support his conviction because "Colonial Savings Mortgage," the entity from which he claims to have taken the check, is not a bank. When reviewing challenges to the sufficiency of evidence, we view the evidence and all

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[11] *See Reyes*, 102 F.3d at 1365 (declining to exercise discretion to correct a constructive amendment, under plain error review, in part because the offense upon which the jury was charged could have been charged in the indictment).

inferences that can be drawn therefrom in the light most favorable to the verdict.[12] At trial, Judy Monroe testified that she worked for Colonial Savings Bank, that it was a banking institution insured by the FDIC, and that the stolen check bore her signature. While her testimony, and the testimony of others, sometimes distinguished between Capital Savings Mortgage and Capital Savings Bank, nothing in the record establishes that Capital Savings Mortgage was a legal entity distinct from Capital Savings. While identifying the source of the check, she stated that she worked for Colonial Savings Bank and confirmed its FDIC insurance. She differentiated between the mortgage company and the bank only in explaining specific procedures. The government offered sufficient evidence to support the jury's finding that Daniels took the check from an insured bank.

Daniels also argues that when computing the value of the check he stole, we should deduct the $30,000 he was entitled to receive. Daniels accepts the premise that the check can be valued by the amount he filled in. Since the check was made out for less than $30,000, however, Daniels argues that he stole nothing worth $1,000 or more. As we have explained, Colonial Savings held the mortgage on the insured property, and by its terms had an interest in the insurance proceeds. Daniels acknowledged that interest in his agreement with the bank, an agreement reached before he took the check and deposited it.

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[12] *See United States v. Moreno*, 185 F.3d 465, 471 (5th Cir. 1999).

Daniels complains of the trial court's answer to a question by the jury. The jury asked for clarification of the phrase "intent to steal." The judge responded that it "means with a purpose to steal and that the taking or carrying away was not by accident [or] mistake." While Daniels objected to the supplemental instruction, he did not do so on the grounds urged here,[13] thus our review is for plain error.[14] Daniels essentially repeats his scienter argument, and it is no more compelling here. We reject it for the reasons stated previously.

The judgment of conviction is AFFIRMED.

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[13] Daniels objected to any supplemental instruction, on the grounds that the jury's note did not make clear what they were confused about. Daniels also objected to the wording of the trial judge's proposed instruction, but it was modified to address the objection, a modification he accepted.

[14] *See United States v. Cabral-Castillo*, 35 F.3d 182, 188-89 (5th Cir. 1994) (holding that were defendant objected to a sentencing judgment, but on grounds different from those raised on appeal, the new arguments raised on appeal would be reviewed for plain error.)

United States District Court
NORTHERN DISTRICT OF TEXAS
Fort Worth Division

UNITED STATES OF AMERICA	**JUDGMENT IN A CRIMINAL CASE**
v.	Case Number: 4:99-CR-029-Y (1)
RANDLE CURTIS DANIELS	Terri Moore, Assistant U.S. Attorney Ward Casey, Defendant's Attorney
	(Filed Jun. 20, 2000)

The defendant was found guilty upon a jury verdict on counts 1 and 2 of the two-count Indictment after a plea of not guilty. Accordingly, the defendant is adjudged guilty of such counts, which involve the following offense:

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
18 U.S.C. § 2113(b)	Bank Theft, a Class B Felony	November 21, 1995	1
18 U.S.C. § 1957 & 2	Engaging in Monetary Transactions in Property Derived from Specified Unlawful Activity and Aiding and Abetting, A Class B Felony	December 6, 1995	2

The defendant is sentenced as provided in pages 2 through 4 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant pay a special assessment of $200 for counts 1 and 2 of the two-count Indictment, which shall be due immediately.

It is further ordered that the defendant shall notify the United States Attorney for this district within thirty (30) days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.:	452-27-8949
Defendant's U.S. Marshal No.:	33885-077
Defendant's Date of Birth:	November 9, 1959
	June 19, 2000
	Date of Imposition of Sentence
Defendant's Legal Address:	4630 Collinwood Fort Worth, Texas 76107
Defendant's Current Address:	same

/s/ Terry R. Means
TERRY R. MEANS
U.S. DISTRICT JUDGE

SIGNED June 20, 2000

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____ at _____, with a certified copy of this judgment.

_____
United States Marshal

By _____
Deputy Marshal

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 00-10672

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

RANDLE CURTIS DANIELS,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Texas, Fort Worth

ON PETITION FOR REHEARING EN BANC

(Opinion 5/21/01, 5 Cir., ___, ___ F.3d ___)

(Filed June 15, 2001)

Before REYNALDO G. GARZA, HIGGINBOTHAM, and SMITH, Circuit Judges.

PER CURIAM:

(✓) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5th CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel

Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor (FED. R. APP. P. and 5th CIR. R. 35), the Petitioner for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

s/ Patrick E. Higginbotham
United States Circuit Judge

REHG-6a

18 USC §1957. Engaging in monetary transactions in property derived from specified unlawful activity

(a) Whoever, in any of the circumstances set forth in subsection (d), knowingly engages or attempts to engage in a monetary transaction in criminally derived property of a value greater than $10,000 and is derived from specified unlawful activity, shall be punished as provided in subsection (b).

(b)(1) Except as provided in paragraph (2), the punishment for an offense under this section is a fine under title 18, United States Code, or imprisonment for not more than ten years or both.

(2) The court may impose an alternate fine to that imposable under paragraph (1) of not more than twice the amount of the criminally derived property involved in the transaction.

(c) In a prosecution for an offense under this section, the Government is not required to prove the defendant knew that the offense from which the criminally derived property was derived was specified unlawful activity.

(d) The circumstances referred to in subsection (a) are –

(1) that the offense under this section takes place in the United States or in the special maritime and territorial jurisdiction of the United States; or

(2) that the offense under this section takes place outside the United States and such special jurisdiction, but the defendant is a United States

person (as defined in section 3077 of this title, but excluding the class described in paragraph (2)(D) of such section.)

(e) Violations of this section may be investigated by such components of the Department of Justice as the Attorney General may direct, and by such components of the Department of the Treasury as the Secretary of the Treasury may direct, as appropriate and, with respect to offenses over which the United States Postal Service has jurisdiction, by the Postal Service. Such authority of the Secretary of the treasury and the Postal Service shall be exercised in accordance with an agreement which shall be entered into by the Secretary of the Treasury, the Postal Service, and the Attorney General.

(f) As used in this section –

(1) the term "monetary transaction" means the deposit, withdrawal, transfer, or exchange, in or affecting interstate or foreign commerce, of funds or a monetary instrument (as defined in section 1956(c)(5) of this title) by, through, or to a financial institution (as defined in section 1956 of this title), including any transaction that would be a financial transaction under section 1956(c)(4)(B) of this title, but such term does not include any transaction necessary to preserve a person's right to representation as guaranteed by the sixth amendment to the Constitution;

(2) the term "criminally derived property" means any property constituting, or derived from, proceeds obtained from a criminal offense; and

(3) the term "specified unlawful activity" has the meaning given that term in section 1956 of this title.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

UNITED STATES OF AMERICA	:	CRIMINAL ACTION NO. 4:99-CR-029-Y
v.	:	
RANDLE CURTIS DANIELS	:	
.....	:	

Offense Level Computations

* * *

38. The November 1, 1998 edition of the Guidelines Manual was used in this case.

39. The defendant was convicted of one count of Bank Theft and one count of Engaging in Monetary Transactions in Property Derived from Specified Unlawful Activity, Pursuant to USSG § 3D1.2(d), since the offense level is determined largely on the basis of the total amount of harm or loss, the two counts shall be grouped together into a single group. According to USSG § 3D1.2(b), in the case of counts grouped together pursuant to a group is the offense level corresponding to the aggregated quantity, determined in accordance with Chapter Two and Parts A, B and C of Chapter Three. When the counts involve offenses of the same general type to which different guidelines apply, apply the offense guideline that produces the highest offense level. In this case, the offense of Engaging in Monetary Transactions in Property

Derived from Specific Unlawful Activity produces the highest guideline. Therefore, it will be used to calculate the guidelines.

40. Base Offense Level: The base offense level for a violation of 18 USC § 1957 is found in USSG § 2S1.2. Pursuant to USSG § 2S1.2, the base offense level is 17. 17

41. Specific Offense Characteristic: None. 0

42. Victim Related Adjustment: None. 0

43. Adjustment for Role in the Offense: None. 0

44. Adjustment for Obstruction of Justice: As indicated in paragraphs 32, 33 and 34, the defendant obstructed justice by committing perjury during his trial testimony. Pursuant to USSG § 3C1.1, the base offense level is increased by 2 levels. +2

45. Adjustment for Acceptance of Responsibility: As indicated in paragraph 35, the defendant does not qualify for a reduction for acceptance of responsibility. 0

46. Total Offense Level: 19

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

UNITED STATES OF AMERICA	§	
v.	§	No. 4-99 CR-029-Y
RANDLE CURTIS DANIELS	§	

INDICTMENT

The Grand Jury Charges:

COUNT I

On or about November 21, 1995, in the Fort Worth Division of the Northern District of Texas, RANDLE CURTIS DANIELS, defendant, did willfully and unlawfully take and carry away, with intent to steal and purloin, a presigned check of a value exceeding $1000 belonging to and in the care, custody, control, management, and possession of Colonial Savings Bank, 2626 B West Freeway, Fort Worth, Texas a banking institution, the deposits of which were then and there insured by the Federal Deposit Insurance Corporation.

A violation of Title 18, United States Code, § 2113(b).

COUNT 2

On or about December 6, 1995, in the Fort Worth Division of the Northern District of Texas, defendant, RANDLE CURTIS DANIELS, aided and abetted by

another, did knowingly and willfully engage and attempt to engage in a monetary transaction affecting interstate commerce, in an amount over $10,000, by and through, and to a financial institution, in criminally derived property, that was derived from a specified unlawful activity, namely, bank theft, in violation of Title 18, United States Code, Section 2113 (b), that is, defendant, RANDLE CURTIS DANIELS caused the withdrawal in the amount of $29,500 from the account of Marsha Veach, account number 4752037772 at Bank One knowing that the property involved represented the proceeds of some form of unlawful activity.

In violation of Title 18, United States Codes, Sections 1957 and 2.

A TRUE BILL,

S/_____
FOREMAN

PAUL E. COGGINS
UNITED STATES ATTORNEY

_____
TERRI MOORE
Assistant United States Attorney
State Bar of Texas No. 14377780
801 Cherry Street, Suite 1700
Fort Worth, Texas 76102
(817) 252-5200

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

UNITED STATES OF AMERICA	:	CRIMINAL ACTION NO. 4:99-CR-029-Y
v.	:	Fort Worth, Texas February 1, 2000
RANDLE CURTIS DANIELS	:	
.....	:	

VOLUME 2
TRANSCRIPT OF THE TRIAL
(Excerpt – Testimony of Marsha Veach)
BEFORE THE HONORABLE TERRY R. MEANS,
UNITED STATES DISTRICT JUDGE, AND A JURY.

* * *

Cross – Davidson/Veach Vol. 2:198

A. Yes.

Q. And you were the one that moved the money into your checking account?

A. We both did.

Q. And then you moved the money from your – you wrote a check out of your checking account to move the money into Randle's account, right?

A. Yes.

Q. And that was your idea, too, because you wanted to get rid of this money, right?

A. That was my idea, yes.

Q. And I gather it wasn't because you thought there was anything wrong with the money, that it was tainted

or anything. It was just you were tired of dealing with, I guess, the perfectionist character of Randle?

A. Yes.

Q. Now, you mentioned that Randle always had you make your rent payments in cash; is that right?

A. He preferred for me to give him cash.

Q. Okay. But when you first moved in, didn't you start off writing checks? . . .

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

UNITED STATES OF AMERICA	:	CRIMINAL ACTION NO. 4:99-CR-029-Y
v.	:	
RANDLE CURTIS DANIELS	:	
.....	:	

* * *

(Excerpt from jury instructions:)

. . . government has proved each of the following beyond a reasonable doubt:

First: That the defendant took and carried away a thing of value, belonging to and in the care, custody, control, management, possession of Colonial Savings Bank;

Second: That at the time Colonial Savings Bank had its deposits insured by the Federal Deposit Insurance Corporation;

Third: That the defendant took and carried away the thing of value with the intent to steal; and

Fourth: That such thing of value exceeded $1000 in value.

Steal means the wrongful taking of money or property, belonging to another with intent to deprive the owner of its use and benefit either temporarily or permanently.

A "federally insured bank" means any bank the deposits of which are insured by the Federal Deposit Insurance Corporation.

Count two charges the defendant with money laundering in violation of 18, United States Code, sections 1957 and 2.

Title 18, United States Code, section 1957 and 2, makes it a crime for anyone to knowingly engage in a monetary transaction affecting interstate commerce, in an amount over $10,000, that was derived from a specified unlawful activity.

For you to find the defendant guilty of this crime, you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: That the defendant knowingly engaged or attempted to engage in a monetary transaction in criminal derived property that is of a value greater than $10,000;

Second: That the property is derived from a specified unlawful activity, namely bank theft;

Third: That the defendant knew that the property represented the proceeds of some form of unlawful activity.

To "conduct" includes initiating, concluding, or participating in a transaction.

To "attempt to conduct" a transaction means to do something that was a substantial step beyond mere preparation toward initiating, concluding, or participating in a transaction.

The term "proceeds" includes any property, or any interest in property, that someone acquires or retains as a result of the commission of the underlying specified unlawful activity. Proceeds can be any kind of property, not just money.

The term "transaction" includes a transfer, and with respect to a financial institution, includes a deposit, withdrawal, transfer between accounts, exchange of currency, loan extension of credit, purchase or sale of any stock, bond, certificate of deposit, or other monetary instrument, or any other payment, transfer, or delivery by, through, or to a financial institution, by whatever means effected.

The term "financial transaction" means (A) a transaction which in any way or degree affects interstate or foreign commerce (i) involving the movement of funds by wire or other means or (ii) involving one or more monetary instruments, or (iii) involving the transfer of title to any real property, vehicle, vessel, or aircraft, or (B) a transaction involving the use of a financial institution which is engaged in, or the activities of which affect, interstate or foreign commerce in any way of degree.

The term "monetary instruments" means (i) coin or currency of the United States or of any other country, travelers' checks, personal checks, bank checks, and money orders, or (ii) investment securities or negotiable instruments, in bearer form or otherwise in such form that title thereto passes upon delivery.

"Specified unlawful activity": includes violations of Title 18 United States Code, Section 2113(b), bank theft.

The term "monetary transaction" means the deposit, withdrawal, transfer, or exchange, in or affecting interstate or foreign commerce, of funds or a monetary instrument by, through, or to a financial institution, including any transaction that would be a financial transaction.

The term "criminally derived property" means any property constituting, or derived from, proceeds obtained from a criminal offense.

The guilt of a defendant in a criminal case may be established without proof that the defendant personally did every act constituting the offense alleged. The law recognizes that, ordinarily, anything a person can do for himself may also be accomplished by that person through the direction of another person as his agent, or by acting in concert with, or under the direction of, another person or persons in a joint effort or enterprise.

If another person is acting under the direction of the defendant or if the defendant joins another person and performs acts with the intent to commit a crime, then the law holds the defendant responsible for the acts and conduct of such other persons just as though the defendant had committed the acts or engaged in such conduct.

Before any defendant may be held criminally responsible for the acts of others it is necessary that the accused deliberately associate himself in some way with the crime and participate in it with the intent to bring about the crime.

Of course, mere presence at the scene of a crime and knowledge that a crime is being committed are not sufficient to establish that a defendant either directed or aided

and abetted the crime unless you find beyond a reasonable doubt that the defendant was a participant and not merely a knowing spectator.

In other words, you may not find any defendant guilty unless you find beyond a reasonable doubt that every element of the offense as defined in these instructions was committed by some person or persons, and that the defendant voluntarily participated in its commission with the intent to violate the law.

You will note that the Indictment charges that the offense was committed on or about a specified date. The government does not have to prove that the crime was committed on that exact date, so long as the government proves beyond a reasonable doubt that the defendant committed the crime on a date reasonably near the date as stated in each count of the indictment.

You are here to decide whether the government has proved beyond a reasonable doubt that the defendant is guilty of the crime charged. The defendant is not on trial for any act, conduct, or offense not alleged in the Indictment. Neither are you concerned with the guilt of any other person or persons not on trial as a defendant in this case.

If the defendant is found guilty, it will be my duty to decide what the punishment will be. You should not be concerned with punishment in any way. It should not enter your consideration or discussion.

To reach a verdict, all of you must agree. Your verdict must be unanimous. Your deliberations will be secret. You will never have to explain your verdict to anyone.

It is your duty to consult with one another to deliberate in an effort to reach an agreement if you can do so. Each of you must decide the case for yourself, but only after an impartial consideration of the evidence with your fellow jurors. During your deliberations, do not hesitate to reexamine your own opinions and change your mind if convinced that you were wrong. But do not give up your honest beliefs as to the weight or effect of the evidence solely because of the opinion of your fellow jurors or for the mere purpose of returning a verdict.

Remember at all times, you are judges, judges of the facts. Your sole interest is to seek the truth from the evidence in the case, to decide whether the government has proved the defendant guilty beyond a reasonable doubt.

When you go to the jury room, the first thing that you should do is select one of your number as your foreperson, who will help to guide your deliberations and will speak for you here in the courtroom.

A form of verdict has been prepared for your convenience.

The foreperson will write the unanimous answer of the jury in the space provided. At the conclusion of your deliberations, the foreperson should date and sign the verdict.

If you need to communicate with me during your deliberations, the foreperson should write the message and give it to the marshal. I will either reply in writing or bring you back into the court to answer your message.

Bear in mind that you are never to reveal to any person, not even to the Court, how the jury stands, numerically or otherwise, until after you have reached a unanimous verdict.

DATE: _____

_____
Terry R. Means

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

UNITED STATES OF AMERICA	:	CRIMINAL ACTION NO. 4:99-CR-029-Y
v.	:	Fort Worth, Texas February 4, 2000
RANDLE CURTIS DANIELS	:	

VOLUME 5
TRANSCRIPT OF THE TRIAL
BEFORE THE HONORABLE TERRY R. MEANS,
UNITED STATES DISTRICT JUDGE, AND A JURY.

(Filed Sep. 25, 2000)

* * *

(Defense argument:)

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. . . and if you weren't certain, you will find him not guilty.

I want to urge each one of you to make your own decision in this case. Don't just follow the crowd. It's too important, and each one of you knows it's too important for that. Don't let yourself be talked into a decision that you're going to regret next week or next month. Once your decision is announced in open court, you can't come back a week later and say, I've changed my mind. I think I've made the wrong decision. Please be sure of your decision. Take the time if you need to. Take the time and

be sure. And if you are not convinced beyond a reasonable doubt, then it is your duty and your right to find Randle Daniels not guilty.

Now, I'm not going to spend a lot of time talking about Count 2, the money laundering. I just want to point out a couple of things. One is Randle didn't move that money. Marsha Veach moved the money, and Marsha Veach moved the money because she was tired of messing with it. The money was put into her account for the purpose of her working with the contractors and paying them, and she couldn't please Randle. She got tired of it, and she wanted to get rid of it. So it was her idea.

I also want to point out the obvious about the money laundering, and that is if there is no bank theft, there is no money laundering. If Randle is not guilty of Count 1, he is not guilty of Count 2, because if he didn't commit bank theft, . . .

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

UNITED STATES OF AMERICA	:	CRIMINAL ACTION NO. 4:99-CR-029-Y
v.	:	
RANDLE CURTIS DANIELS	:	
.....	:	

* * *

(Excerpt from Prosecutor's argument:)

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. . .

THE COURT: Ms. Moore.

MS. MOORE: Ladies and gentlemen, I want to point out another thing in the Court's charge because Mr. Davidson said, well, Randle didn't deposit that check in Marsha's account and Randle didn't move it, and Randle, of course, didn't do any of that. Of course, you remember Randle's testimony. That was all Marsha's idea. He doesn't accept responsibility for absolutely anything.

But if you will look on Page 7 of the Court's charge, it provides for: The guilt of the defendant in a criminal case may be established without proof that the defendant personally did every act constituting them of the offense. The law recognizes that ordinarily anything a person can do for himself may also be accomplished by that person through the direction of another person as his agent or by acting in concert with or under the direction of.

So when Marsha made the deposit, it was at his request. He didn't have to make the deposit in her savings account in order for him to be found guilty of money laundering. She did it at his request.

I want you to notice something else – may I look at these exhibits for a second?

THE COURT: Yes, ma'am.

MS. MOORE: On that – well, they are back here in some sort of order, but on the check, the cashier's check, . . .

No. 01-752

In the Supreme Court of the United States

RANDLE CURTIS DANIELS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

THEODORE B. OLSON
Solicitor General
Counsel of Record
MICHAEL CHERTOFF
Assistant Attorney General
NINA GOODMAN
Attorney
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether a constructive amendment of petitioner's indictment occurred at trial in this case and required reversal of petitioner's money laundering conviction.

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In the Supreme Court of the United States

No. 01-752

RANDLE CURTIS DANIELS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A8) is reported at 252 F.3d 411.

JURISDICTION

The judgment of the court of appeals was entered on May 21, 2001. A petition for rehearing was denied on June 15, 2001 (Pet. App. A12-A13). The petition for a writ of certiorari was filed on August 17, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Texas, petitioner was convicted of one count of bank theft, in violation of

18 U.S.C. 2113(b); and one count of money laundering, in violation of 18 U.S.C. 1957. He was sentenced to 30 months' imprisonment. The court of appeals affirmed. Pet. App. A1-A8.

1. In 1995, petitioner received a check for $46,000 from his insurance company to cover the cost of repairs to his house, which had been damaged by a storm. The check was payable jointly to petitioner and Colonial Savings Bank, which held the mortgage on petitioner's house. Petitioner and the bank manager eventually agreed that the bank would pay petitioner $16,000 immediately and would place the remaining $30,000 in a trust account, to be disbursed as needed to pay for the repairs to petitioner's house. Pet. App. A1-A2.

While the $16,000 check was being prepared, petitioner stole a blank, signed bank check from the desk of a bank employee. Petitioner made the bank check out for $29,800 to "cash or Marsha Veach," and directed Veach, who was his girlfriend, to deposit it in her account. Veach deposited the bank check and later wrote a check for $29,500 to Texas Commerce Bank, where petitioner had an account. Pet. App. A2; Gov't C.A. Br. 7-11.

2. A federal grand jury returned an indictment charging petitioner with bank theft, in violation of 18 U.S.C. 2113(b) (Count 1), and with engaging in a monetary transaction in property derived from unlawful activity, in violation of 18 U.S.C. 1957 (Count 2). Pet. App. A19-A20. Count 2 alleged that petitioner had "caused the withdrawal in the amount of $29,500 from the account of Marsha Veach." *Id.* at A20.

3. At trial, Veach testified that petitioner had directed her to deposit the stolen bank check into her account. 2/1/00 Tr. 187, 191. Veach further testified that she and petitioner had argued about the arrange-

ments for repairing petitioner's home, and that she had eventually decided to return the money to petitioner. *Id.* at 192. On direct examination, Veach testified that she had made the check out to Texas Commerce Bank "at [petitioner's] request." *Id.* at 192-194. On cross-examination, however, Veach testified that it was her own idea to "move the money into [petitioner's] account." *Id.* at 198.

Petitioner testified in his own defense. He denied that he had stolen the blank check and claimed that a bank representative had given the check to him. Pet. App. A2; Gov't C.A. Br. 9-10.

In his closing argument concerning the money laundering count, defense counsel noted that if petitioner "didn't commit bank theft, then he can't have laundered money that he knew came from bank theft." 2/4/00 Tr. 27-28. Petitioner's counsel also argued that the evidence showed that "Marsha Veach moved the money," and that it was Veach's idea, not petitioner's, to withdraw the money from her account and deposit it in petitioner's account. *Id.* at 27.

The government's rebuttal argument pointed out that petitioner had asked Veach to deposit the stolen check in her account and noted that the government was not required to prove "that the defendant personally did every act constituting * * * the offense." 2/4/00 Tr. 38 (Pet. App. A32). Government counsel stated that "when Marsha made the deposit, it was at his request. He didn't have to make the deposit in her savings account in order for him to be found guilty of money laundering. She did it at his request." *Ibid.* (Pet. App. A33). Counsel then went on to summarize the evidence that petitioner was guilty of money laundering based on the transaction charged in the indictment—the check from Veach to Texas Commerce

Bank. *Id.* at 38-40. Counsel explained that "we're alleging that [petitioner] had her make [the check] out to Texas Commerce Bank and not him as one more attempt to distance himself from that money that he stole." *Id.* at 39.

At the close of the evidence, the district court instructed the jury that petitioner could be found guilty on the money laundering count only if the government had proved beyond a reasonable doubt that petitioner "knowingly engaged or attempted to engage in a monetary transaction in criminal derived property," that the property was "derived from a specified unlawful activity, namely bank theft," and that petitioner "knew that the property represented the proceeds of some form of unlawful activity." Pet. App. A24. The court defined the term "monetary transaction" to include "the deposit, withdrawal, transfer, or exchange, in or affecting interstate or foreign commerce, of funds or a monetary instrument by, through, or to a financial institution." *Id.* at A26. The court cautioned the jury, however, that its duty was "to decide whether * * * [petitioner] is guilty of the crime charged," and that petitioner was "not on trial for any act, conduct, or offense not alleged in the Indictment."[1] *Id.* at A27. The jury found petitioner guilty on both the bank theft and money laundering counts. *Id.* at A1.

4. The court of appeals affirmed. Pet. App. A1-A8. Petitioner argued, *inter alia*, that the jury charge on the money laundering count had constructively amended the indictment by permitting the jury to convict him for causing the deposit of the criminally

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[1] The prosecutor read the indictment to the jury at the beginning of the trial, and a copy of the indictment was given to each juror. 1/31/00 Tr. 71, 78-79.

derived funds, rather than for causing the withdrawal of the funds as alleged in the indictment. Because petitioner had not objected to the jury instructions at trial, the court of appeals reviewed his claim for plain error. *Id.* at A5 & n.8 (citing *United States* v. *Olano*, 507 U.S. 725 (1993)). Under that standard, an appellate court may correct an error not raised below only if there was (1) error, (2) that was "plain," (3) that "affected the substantial rights of the defendant," and (4) that "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings." *Id.* at A5 (quoting *Olano*, 507 U.S. at 736).

The court of appeals "[a]ssum[ed] without deciding" that the first three prongs of the plain-error test were met, but declined to "exercise [its] discretion to correct any error." Pet. App. A5. The court reasoned that "[t]he two acts—deposit and withdrawal—are so closely linked here that * * * the 'fairness, integrity or public reputation of judicial proceedings' is not implicated." *Id.* at A6. The court observed that evidence concerning the deposit was "relevant to prove that [petitioner] controlled the funds and to impeach any testimony that the withdrawal was Veach's own idea." The court further explained that although the jury might have "credited [Veach's] testimony and convicted [petitioner] for the unindicted act of depositing illicit funds," it was "equally possible that the jury disbelieved her testimony and properly convicted [petitioner] for the indicted act of withdrawing illicit funds." *Ibid.*

ARGUMENT

Petitioner contends (Pet. 7-10) that the court of appeals' decision in this case conflicts with the decision of the Fourth Circuit in *United States* v. *Floresca*, 38 F.3d 706 (1994) (en banc), and that the conflict warrants

resolution by this Court. In *Floresca*, the court of appeals held that "constructive amendments of a federal indictment are error *per se*, and * * * must be corrected on appeal even when not preserved by objection." *Id.* at 714. While the Fifth Circuit here held that the constructive amendment of an indictment does not automatically require reversal where the claim was not preserved below, see Pet. App. A5-A6 & n.8, this case presents an inappropriate vehicle to address the issue, because petitioner failed to demonstrate that a constructive amendment occurred at trial.[2]

1. A constructive amendment of the indictment occurs when the evidence at trial or the jury instructions so modify essential elements of the offense charged that there is a substantial likelihood that the defendant has been convicted of a different offense than the one charged in the indictment. See, *e.g.*, *United States* v. *Miller*, 471 U.S. 130, 138-145 (1985); *Stirone* v.

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[2] This Court has granted certiorari in *United States* v. *Cotton*, No. 01-687 (Jan. 4, 2002), in which the question presented is whether the omission from a federal indictment of a fact that enhances the statutory maximum sentence requires a court of appeals, on plain error review, automatically to vacate the enhanced sentence. Some courts of appeals have expressed the view that the analysis in a case like *Cotton* has some elements in common with the analysis in a case involving a constructive amendment. See *United States* v. *Thomas*, 274 F.3d 655, 671-672 (2d Cir. 2001) (en banc); *United States* v. *Cotton*, 261 F.3d 397, 405 (4th Cir. 2001); *United States* v. *Maynie*, 257 F.3d 908, 920 (8th Cir. 2001), petition for cert. pending, No. 01-7565 (filed Jan. 4, 2002). The decision in *Cotton* may therefore shed light on constructive amendment claims raised for the first time on appeal, effectively resolving any conflict between the approach taken in *Floresca* and the approach taken by the Fifth Circuit here. The petition in this case need not be held for *Cotton*, however, because there was no constructive amendment on the facts of this case.

United States, 361 U.S. 212, 218-219 (1960). In this case, the district court instructed the jury that its task was to determine whether petitioner was "guilty of the crime charged," and that petitioner was "not on trial for any act, conduct, or offense not alleged in the Indictment." Pet. App. A27. Moreover, the indictment was read to the jury at the beginning of the trial, and the court gave the jurors copies of the indictment for use during their deliberations. 1/31/00 Tr. 71, 78-79. The court's instructions therefore precluded the jury from finding petitioner guilty of money laundering based on any monetary transaction other than the one—"the withdrawal in the amount of $29,500 from the account of Marsha Veach"—that was identified in the indictment. Pet. App. A20; see *United States* v. *Holley*, 23 F.3d 902, 912 (5th Cir.) (no constructive amendment where indictment was read to jury, jurors had a copy of indictment during deliberations, and instructions included a reminder that jury must consider only crime charged in indictment), certs. denied, 513 U.S. 1043 (1994) and 513 U.S. 1083 (1995).

At closing argument, government counsel stated that "when Marsha [Veach] made the deposit, it was at [petitioner's] request. *[Petitioner] didn't have to make the deposit in her savings account in order for him to be found guilty of money laundering.* She did it at his request." 2/4/00 Tr. 38 (Pet. App. A33) (emphasis added). Taken in isolation, the italicized language might conceivably suggest that petitioner's involvement in the deposit of funds in Veach's account was an appropriate basis for finding him guilty of the money laundering offense. Read in context, however, that statement simply reminded the jury that petitioner could be found guilty of money laundering if he directed Veach to carry out the proscribed act rather than

performing the monetary transaction himself. See *ibid.* (Pet. App. A32) ("The law recognizes that ordinarily anything a person can do for himself may also be accomplished by that person through the direction of another person as his agent."). Subsequent portions of the government's closing argument focused on the withdrawal of funds from Veach's account. *Id.* at 38-40; see *id.* at 39 ("we're alleging that he had her make it out to Texas Commerce Bank and not him as one more attempt to distance himself from that money that he stole"). In any event, the jury was unambiguously instructed that its sole task was to determine whether petitioner was guilty of the crimes charged in the indictment, and this Court has repeatedly applied the principle that jurors are "presumed to follow their instructions." *Richardson* v. *Marsh*, 481 U.S. 200, 211 (1987). This case therefore provides no occasion for consideration of the proper standard of review of an unpreserved claim that the district court's instructions constructively amended the indictment by permitting the jury to convict the defendant of uncharged conduct.

2. Contrary to petitioner's assertion (Pet. 5-6), the ruling below does not conflict with this Court's decision in *Stirone* v. *United States*, 361 U.S. 212 (1960). In *Stirone*, the Court held that a defendant had been deprived of his Fifth Amendment right to a grand jury indictment when the proof at trial and the jury charge broadened the bases for conviction from those charged in the indictment. The Court went on to observe that such a deprivation "is far too serious to be treated as nothing more than a variance and then dismissed as harmless error." *Id.* at 217. In contrast to this case, however, *Stirone* involved a claim of error that was properly preserved at trial, see *id.* at 214, and the Court thus had no occasion to determine what analysis would

have applied if the claim had been raised for the first time on appeal.

In any event, as we explain above, there was no constructive amendment of the indictment in this case. In *Stirone*, a case brought under the Hobbs Act, the indictment charged that Stirone had engaged in extortion that obstructed the victim's receipts of shipments of sand from outside Pennsylvania into that State to be used for production of concrete at the victim's plant. See 361 U.S. at 213-214. At trial, however, the government introduced evidence of a different impact on commerce—namely, that concrete made by the plant would be used in a steel mill that would export steel to other States. See *id.* at 214. The district court instructed the jury that it could find Stirone guilty of interfering with commerce by extortion based on that alternative theory. *Ibid.* This Court concluded that the indictment had been unconstitutionally broadened and that Stirone was thereby "convicted on a charge the grand jury never made against him." *Id.* at 219. Here, by contrast, the jury instructions made clear that petitioner could be found guilty only of "the crime charged," not "for any act, conduct, or offense not alleged in the Indictment." Pet. App. A27.

Petitioner's reliance (Pet. 7-10) on *United States* v. *Floresca*, 38 F.3d 706 (4th Cir. 1994) (en banc), is misplaced for the same reason. The indictment in *Floresca* charged the defendant with witness tampering, in violation of 18 U.S.C. 1512(b)(1), but the district court mistakenly instructed the jury on the elements of a different subsection of the statute, 18 U.S.C. 1512(b)(3). 38 F.3d at 708-709. The court of appeals concluded that the instruction constructively amended the indictment by "stat[ing] a distinct, unindicted offense." *Id.* at 710. In this case, by contrast, the district court correctly

instructed the jury on the elements of the charged offenses, Pet. App. A23-A26, and it reminded the jurors that petitioner was "not on trial for any act, conduct, or offense not alleged in the Indictment," *id.* at A27.

3. Petitioner's reliance (Pet. 10-12) on *Stromberg* v. *California*, 283 U.S. 359 (1931), is likewise misplaced. *Stromberg* did not involve a constructive amendment of an indictment. The defendant in *Stromberg* was convicted of violating a state statute that made it unlawful to display a red flag in a public place for any one of three purposes. *Id.* at 361. After concluding that one of the grounds for conviction under the statute was unconstitutional, this Court held that because it was impossible to tell on which ground the jury relied, the conviction must be reversed. *Id.* at 368-370. As the Court explained in *Griffin* v. *United States*, 502 U.S. 46, 53 (1991), *Stromberg* stands for "the principle that, where a provision of the Constitution forbids conviction on a particular ground, the constitutional guarantee is violated by a general verdict that may have rested on that ground."

The present case is distinguishable from *Stromberg* in at least three respects. First, unlike petitioner, the defendant in *Stromberg* preserved her constitutional challenge in the trial court. See 283 U.S. at 361. Second, the California statute at issue in *Stromberg* permitted conviction for conduct—the display of a red flag to express peaceful opposition to organized government—that the State lacked power to prohibit. *Id.* at 369-370. Here, by contrast, petitioner's involvement in depositing the stolen check into Veach's account was not constitutionally protected conduct, and it was prohibited by the money laundering statute. See Pet. App. A5-A6 (noting that the "act of causing the deposit of illicit funds could have properly been charged in the

indictment and is prohibited by statute"). Finally, even if *Stromberg* were extended to apply to a possibility that a conviction rested on unindicted conduct, the instructions given in this case specifically precluded the jury from finding petitioner guilty based on acts not charged in the indictment.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 2002